O/1213/25

TRADE MARKS ACT 1994

IN THE MATTER OF UK TRADE MARK APPLICATION NUMBER 4070425

BY WAREHOUSE 16 LTD

FOR THE FOLLOWING TRADE MARK:

THERMO HAUSER

IN CLASS 30

AND

IN THE OPPOSITION THERETO UNDER NUMBER 450103

BY THERMOHAUSER GMBH

BACKGROUND & PLEADINGS

1. On 1 July 2024, Warehouse 16 Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision in the United Kingdom ("the contested mark").[1] The contested mark was published for opposition purposes in the Trade Marks Journal on 12 July 2024 in respect of the following goods:

   Class 30: Powder (Cake -); Cake powder; Cake frosting; Sponge cake; Frosting [icing] (Cake -); Cake frosting [icing]; Cake icing; Chocolate cake; Almond cake; Icing for cakes; Cake batter; Candy cake; Cake flour; Sponge cakes; Cake dough; Cake Pops; Cake mixtures; Cream cakes; Cake mixes; Cake doughs; Iced sponge cakes; Candy cake decorations; Treacle cake; Deep chocolate cake made with chocolate sponge; Chocolate cakes; Breakfast cake; Chocolate decorations for cakes; Cakes; Cake bars; Ice-cream cakes; Cake preparations; Cupcakes; Sponge fingers [cakes]; Powder for making cakes; Cake decorations made of candy; Edible ice powder for use in icing machines; Ice cream cakes; Fruit cake snacks; Chocolate covered cakes; Dough for cakes; Rice cake snacks; Crystallized sugar for decorating cakes; Fruit cakes; Shortbread with a chocolate coating; Candy decorations for cakes; Frosting mixes; Iced fruit cakes; Icing; Baking powder.

2. On 10 October 2024, the contested mark was opposed by Thermohauser GmbH ("the opponent"). The opposition is brought under Section 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 ("the Act").

3. For the purposes of its opposition, the opponent relies upon the following word mark (the "earlier mark"):

   THERMOHAUSER
   Trade mark number: UK00913045547
   Filing Date: 1 July 2014
   Registration Date: 3 August 2015

[1] The application was originally registered by Unicomplex Ltd on 1 July 2024. However, the applicant filed a TM21a on 21 July 2025 confirming that the recorded owner of the contested mark was Warehouse 16 Ltd.

4. The opponent relies upon all of the goods for which its earlier marks are registered, namely those goods listed in paragraph 14 of this decision.

5. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

"(6)(1) In this Act an "earlier trade mark" means –
a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

6. The mark identified in paragraph 3 qualifies as an earlier trade mark under the above provisions. It is noted that the earlier mark has been registered for more than five years at the date of the application for the contested mark and so, in accordance with section 6A of the Act, the applicant could have requested proof of use of the earlier mark from the opponent. However, no such request has been made by the applicant.[2] I am not therefore required to consider this issue and, consequently, the opponent may rely on all of the goods highlighted in paragraph 14 of this decision for the purposes of this opposition.

7. The opponent claims that the marks in issue are "identical" or "near identical", and that the applicant's goods are similar to the opponent's goods. Consequently, the opponent submits that there is a likelihood of confusion on the part of the public.

8. Whilst the applicant's submissions are not overly clear in its counterstatement, it appears that the applicant does not accept that the marks in issue are identical

[2] It is noted that in its Notice of Defence the applicant requested that the opponent provide evidence of its use of the earlier mark for cake powder, cake frosting, cake spray and icing for cakes. However, none of these goods were contained in the opponent's specification, the Tribunal therefore wrote to the applicant by way of an official letter dated 29 March 2025 notifying it of the same and confirming that, if the applicant would still like to request proof of use, it needed to file an amended Form TM8 by 14 April 2025, or the Tribunal would move to strike out the parts of the defence which were not adequately particularised. No amended Form TM8 was filed by the applicant and, accordingly, the Tribunal withdrew the proof of use request and notified the applicant of the same by way of official letter dated 8 May 2025.

or similar on the basis that the contested mark has a space between "Thermo" and "Hauser". The applicant also denies that the goods in issue are similar.

9. The opponent is represented by Withers & Rogers LLP, and the applicant is self-represented. In this case, neither party filed evidence. No hearing was requested, and neither party filed written submissions in lieu of a hearing. This decision is therefore taken following a careful consideration of the papers that have been filed by the parties, which will not be summarised but will be referred to as and where appropriate during this decision.

10. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

DECISION

11. The opponent's opposition is based upon section 5(2)(a) and 5(2)(b) of the Act which stipulates the following:

> ""5(2) A trade mark shall not be registered if because-
>
> (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

12. Section 5A of the Act stipulates that where "grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

13. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*,[3] *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* ("Canon"),[4] *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.*,[5] *Marca Mode CV v Adidas AG & Adidas Benelux BV*,[6] *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*,[7] *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*,[8] *Shaker di L. Laudato & C. Sas v OHIM*[9] and *Bimbo SA v OHIM*[10]:

    a. The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

    b. the matter must be judged through the eyes of the average consumer of the goods in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

    c. the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

    d. the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only

[3] Case C-251/95
[4] Case C-39/97
[5] Case C-342/97
[6] Case C425/98
[7] Case C-3/03
[8] Case C-120/04
[9] Case C-334/05P
[10] Case C-591/12P

when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

e. nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

f. however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

g. a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

h. there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

i. mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

j. the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

k. if the association between the marks creates a risk that the public might believe that the respective services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of Goods

14. The competing goods are as follows:

The opponent's goods	The applicant's goods
Class 8 Manually operated tools and Household implements and kitchen, Namely pastry cutters, Cake dividers, Knives, Pastry tongs, Cake and tart spatulas and rulers, Cutlery, Forks, Spoons, serving tongs. Class 9 Measuring scoops. Class 16 Goods of paper and cardboard, included in class 16, namely baking parchment, cake doilies, cake cases, bread and dough moulds of paper; Paper and cardboard coasters, with and without coating; Interleaving paper; Goods of plastic, namely film and bags of plastic for wrapping or packaging; Paint brushes. Class 20 Plastic containers, including boxes, cases, crates and buckets, carriers for foodstuffs. Class 21 Household or kitchen utensils and containers, Included in class 21, in particular ice packs for foodstuffs, Confectioners' decorating bags [pastry bags], Sleeves, Meal trays, Cookery molds [moulds], Baking mats, Baking parchment; Beaters; insulated containers for food; Glassware for household and kitchen purposes; Paper gloves for household	**Class 30**: Powder (Cake -); Cake powder; Cake frosting; Sponge cake; Frosting [icing] (Cake -); Cake frosting [icing]; Cake icing; Chocolate cake; Almond cake; Icing for cakes; Cake batter; Candy cake; Cake flour; Sponge cakes; Cake dough; Cake Pops; Cake mixtures; Cream cakes; Cake mixes; Cake doughs; Iced sponge cakes; Candy cake decorations; Treacle cake; Deep chocolate cake made with chocolate sponge; Chocolate cakes; Breakfast cake; Chocolate decorations for cakes; Cakes; Cake bars; Ice-cream cakes; Cake preparations; Cupcakes; Sponge fingers [cakes]; Powder for making cakes; Cake decorations made of candy; Edible ice powder for use in icing machines; Ice cream cakes; Fruit cake snacks; Chocolate covered cakes; Dough for cakes; Rice cake snacks; Crystallized sugar for decorating cakes; Fruit cakes; Shortbread with a chocolate coating; Candy decorations for cakes; Frosting mixes; Iced fruit cakes; Icing; Baking powder.

purposes; Plastic bins [dustbins]; Heat insulated plastic containers; Hand-operated tools and utensils for household or kitchen use, namely dough lifters, cream spatulas, rolling pins, domestic rolling pins, biscuit cutters, flour brushers, tart scoops; Food bowls (containers of plastic); Presentation plates, bowls, trays, cake plates and stands for displaying cakes; Cover hoods and serving stands of plastic for foodstuffs. <u>Class 25</u> Clothing, in particular kitchen aprons, chefs' hats, gloves.	

15. The opponent submits that the goods in issue are “similar and complementary” but fails to identify which goods in the parties’ specification it considers to be similar, or the extent to which it considers them to be similar.

16. As outlined above, the applicant denies that the goods in issue are similar. Specifically, the applicant notes “that there is a reason why there are different classes for trademarks as they group different product and services” and submits that the “IPO website system classified our product correctly therefore allegations under Sections 5(2)(a) and 5(2)(b) by the German Trademark owner have no standing and are false”. The applicant appears to me to be denying any similarity between the goods in issue on the basis that they appear in different classes. It should, however, be noted that section 60A of the Act provides that goods are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification[11], or dissimilar on the ground that they appear in different classes under the Nice Classification.

[11] “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957.

17. In *Canon*,[12] the Court of Justice of the European Union ("CJEU") stated (at paragraph 23) that, when making the comparison, "all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

18. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM),* Case T-325/06, the General Court ("GC") stated that "complementary" means:

> "...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking."

19. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case[13], for assessing similarity were:

    a. The uses of the respective goods;

    b. The users of the respective goods;

    c. The physical nature of the goods;

    d. The respective trade channels through which the goods reach the market;

    e. In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

[12] Case C-39/97
[13] [1996] R.P.C. 281

f. The extent to which the respective goods are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods in the same or different sectors.

20. As per the case of *Separode,*[14] I also bear in mind that it is permissible to group the goods together, for the purpose of comparison, where they are sufficiently comparable to be assessable in essentially the same way for the same reasons.

Powder (Cake -); Cake powder; Cake frosting; Frosting [icing] (Cake -); Cake frosting [icing]; Cake icing; Icing for cakes; Cake batter; Cake flour; Cake dough; Cake mixtures; Cake mixes; Cake doughs; Candy cake decorations; Chocolate decorations for cakes; Cake preparations; Powder for making cakes; Cake decorations made of candy; Edible ice powder for use in icing machines; Dough for cakes; Crystallized sugar for decorating cakes; Candy decorations for cakes; Frosting mixes; Icing; Baking powder.

21. I consider that all of the above referenced goods are ingredients that can be used to make or decorate baked goods. I compare the above referenced goods to the opponent's "Confectioners' decorating bags [pastry bags]", "Baking mats", and "Beaters".

22. All of the aforementioned goods in the opponent's specification are goods used in baking. The nature and method of use of these compared goods clearly differs given that the applicant's goods are edible, and the opponents goods are, self-evidently, not. I do not consider there to be any competition between these compared goods as the baking ingredients and the baking tools play distinct roles within the baking process. You would not therefore purchase one in the place of another. These goods are also not complementary, as I can see no basis for finding that the average consumer would believe that the responsibility for these

[14] BL O/399/10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person

goods lies with the same undertaking, or that they are important or indispensable to each other.[15]

23. Having said that, I consider there to be an overlap in users (i.e., members of the general public looking to make baked goods, or professional bakers) and general purpose, although I recognise that the specific purpose of the goods may differ (where some are used for baking the actual cake and others are used for decorating, for example). I also accept that there is an overlap in trade channels as specialist cake making retailers will sell the applicant's above referenced goods and the opponent's baking tools/articles.

24. Weighing up all of the above, I find these goods to be similar to a low degree.

Sponge cake; Chocolate cake; Almond cake; Candy cake; Sponge cakes; Cake Pops; Cream cakes; Iced sponge cakes; Treacle cake; Deep chocolate cake made with chocolate sponge; Chocolate cakes; Breakfast cake; Cakes; Cake bars; Ice-cream cakes; Cupcakes; Sponge fingers [cakes]; Ice cream cakes; Fruit cake snacks; Chocolate covered cakes; Rice cake snacks; Fruit cakes; Shortbread with a chocolate coating; Iced fruit cakes.

25. All of the above referenced goods are types of baked goods. I compare these goods to the opponent's class 8 and class 9 goods, and the opponent's "Confectioners' decorating bags [pastry bags]", Beaters", "Hand-operated tools and utensils for household or kitchen use, namely dough lifters, cream spatulas, rolling pins, domestic rolling pins, biscuit cutters, flour brushers, tart scoops" and "cake plates and stands for displaying cakes".

26. All of the aforementioned goods in the opponent's specification are goods used in baking. For the same reasons outlined in paragraph 22 above, I consider that these goods differ in nature and method of use to the applicant's above referenced goods. The use/purpose of these goods also differ, with the purpose

[15] *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM),* Case T-325/06

of the applicant's goods being to be eaten, and the purpose of the opponent's goods being to assist with baking or decorating.

27. Whilst all of these compared goods can be purchased from supermarkets, the applicant's edible goods are generally located in separate aisles of those stores to the baking tools. The baking tools/articles are usually located in the home sections of those stores and the edible goods will be located amongst the other food goods. Consequently, I do not consider there to be an overlap in trade channels between these goods.

28. Without any evidence to suggest otherwise, I do not consider that you would purchase the opponent's goods in place of the applicant's goods, nor do I consider that the average consumer would consider that responsibility for the compared goods derives from the same undertaking. Consequently, I do not consider these goods to be competitive or complementary.

29. I do accept that there is a very general overlap in the user of the compared goods on the basis that members of the general public will purchase baked goods and will also purchase bakery tools/supplies for their home. However, I do not consider this to be sufficient to reach a finding of similarity, and I am conscious of the judgment of Iain Purvis KC in *Unicorn Studio Inc v Veronese* in which he stipulated that "any finding of similarity in the end requires the exercise of common sense and requires the hearing officer to stand back and consider the overall question" rather than by engaging "in a box-ticking exercise, asking how many of the factors identified in *TREAT* or in *Canon* could be said to have been satisfied".[16] I therefore find the opponent's goods to be dissimilar to the applicant's above referenced goods.

30. As some degree of similarity between the goods is required for a successful claim under section 5(2)(a) and 5(2)(b) of the Act, the opposition must fail in respect of those goods that I have found to be dissimilar,[17] namely:

[16] [2024] EWHC 1098 (Ch) - paragraph 24
[17] *eSure Insurance v Direct Line Insurance* [2008] ETMR 77 CA

Sponge cake; Chocolate cake; Almond cake; Candy cake; Sponge cakes; Cake Pops; Cream cakes; Iced sponge cakes; Treacle cake; Deep chocolate cake made with chocolate sponge; Chocolate cakes; Breakfast cake; Cakes; Cake bars; Ice-cream cakes; Cupcakes; Sponge fingers [cakes]; Ice cream cakes; Fruit cake snacks; Chocolate covered cakes; Rice cake snacks; Fruit cakes; Shortbread with a chocolate coating; Iced fruit cakes.

31. However, I will proceed to consider whether there is a likelihood of confusion or association on the part of the average consumer in respect of the goods in issue which I have deemed to be similar, and therefore whether the opposition succeeds in respect of those goods under section 5(2)(a) or 5(2)(b) of the Act.

Average consumer and the purchasing act

32. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question (see *Lloyd Schuhfabrik Meyer*[18]).

33. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited,*[19] Birss J. held:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied

[18] Case C-342/97
[19] [2014] EWHC 439 (Ch)

objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

34. I am of the view that the average consumer for all of the parties’ goods will be members of the general public or professionals in the cake making industry. The cost and the frequency of purchase of the goods in issue is likely to vary considerably. The opponent’s goods and the applicant’s baking ingredients are likely to be relatively low in price. Most of the opponent’s goods are reusable and will therefore be purchased infrequently, but some of the opponent’s goods and all of the applicant’s goods cannot be reused and may be purchased relatively frequently. The average consumer will consider factors such as the price, and suitability (and in respect of edible goods, flavour, quality and/or ingredients). In any event, overall, I consider that the level of attention paid will vary from low to medium, depending on the goods in issue and whether the consumer is the general public or a professional.

35. The goods are likely to be obtained by self-selection from the shelves of a retail outlet, or from an online equivalent. Visual considerations are, therefore, likely to dominate the selection process for the goods. However, I do not discount that there will also be an aural component, as a result of word-of-mouth recommendations, or advice being sought from a sales assistant or representative.

Comparison of marks

36. The respective trade marks are shown below:

Earlier mark	Contested Mark
THERMOHAUSER	**THERMO HAUSER**

37. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA,* Case C-291/00, the Court of Justice of the European Union held that:

"54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer."

38. The space between the "thermo" and "hauser" in the contested mark acts as a point of visual difference between the marks in issue. However, I consider that it is likely to go un-noticed by the average consumer, and, consequently, that the marks are visually identical in line with the principle established in *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*.

39. Aurally, I do not consider that the space between the words "thermo" and "hauser" in the contested mark will be apparent when the mark is pronounced. Consequently, I consider that the marks will be pronounced in exactly the same way by the average consumer, and that they are therefore aurally identical.

40. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU, including *Ruiz Picasso v OHIM*.[20] The assessment must, therefore, be made from the point of view of the average consumer.

41. It is noted that neither party provided any submissions on the conceptual meaning of the marks in issue. In any event, I note that the contested mark contains the words "Thermo" and "Hauser". "Thermo" is a standard English prefix which relates to heat or temperature, and will be recognised as such by the average consumer. I consider that the average UK consumer would view the word "Hauser" as either a foreign language word with no identifiable meaning, or an invented word with no conceptual meaning.

[20] [2006] ECR I-643; [2006] E.T.M.R

42. In relation to the earlier mark, I note that in *Usinor SA v OHIM*,[21] the GC found that " while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Lloyd Schuhfabrik Meyer, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him (Case T 356/02 *Vitakraft-Werke Wührmann v OHIM – Krafft* (VITAKRAFT) [2004] ECR II 3445, paragraph 51, and Case T 256/04 *Mundipharma v OHIM – Altana Pharma* (RESPICUR) [2007] ECR II 0000, paragraph 57). In this instance, whilst the earlier mark consists of one word, rather than two, I consider that the average consumer's attention will be drawn to the part of the earlier mark they will understand (i.e. the "Thermo" element of the mark). For the same reasons outlined above, I do not consider that the average consumer would identify any conceptual meaning from the "hauser" element of the earlier mark. Consequently, to the extent that any conceptual message is derived from the marks, it will be identical for both, and I do not consider that the space in the contested mark will have any impact on that conceptual meaning.

43. Consequently, I consider the marks to be conceptually identical.

Distinctive character of the earlier trade mark

44. In *Lloyd Schuhfabrik Meyer* the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR I-0000, paragraph 49)

[21] Case T-189/05

> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51)."

45. Whilst the distinctiveness of a mark may be enhanced as a result of it having been used in the market, in this instance the opponent has filed no evidence of use. Consequently, I have only the inherent position to consider.

46. Distinctiveness is a scale along which marks of various types sit. A mark which is allusive of the goods/services will have less distinctive character than one that is not; dictionary words will also be less distinctive than words which are entirely fanciful. However, all will turn on the particular facts. For example, there are "invented" words which are really just composites of two allusive words and only distinctive as a result, and dictionary words which are more or less common than others.

47. As discussed above, "thermohauser" is not an English dictionary word. However, for the reasons outlined in paragraphs 41 and 42 above, I consider that the average consumer's attention will be drawn to the element of the earlier mark that they are able to understand,[22] namely the "Thermo" element (which I have found the average consumer will identify as a standard English prefix which relates to heat or temperature). I do not consider that the average consumer would attribute any conceptual meaning to the "hauser" element of the contested mark. The opponent's goods can be summarised as equipment/tools that can be

[22] Usinor SA v OHIM, Case T-189/05

used to assist with baking. I do not consider it to be descriptive or allusive of the remainder of the opponent's good which I have found to be similar to the applicant's goods. Weighing up all of the above, I consider the mark to have a medium level of inherent distinctive character for the relevant goods.

Likelihood Of Confusion

48. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, whilst indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods/services down to the responsible undertakings being the same or related.

49. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind (see *Sabel*[23]). The first is the interdependency principle i.e., a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa (see *Canon*[24]). It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods, and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

50. I have found the applicant's goods referenced in paragraphs 21 to 24 of this decision to be similar to a low degree to the opponent's goods. I have also found the marks to be visually, aurally and conceptually identical.

51. I have found the earlier mark to have a medium level of distinctive character. I have also identified that the average consumer of the goods in issue would be members of the general public or professional bakers whose level of attention

[23] C-251/95, para 22
[24] C-39/97, para 17

will vary from low to medium during the purchasing process, depending on the goods in issue and the average consumer. I have also determined that the purchasing process for all of the goods in issue would be primarily visual in nature, although I do not discount aural considerations.

52. Weighing up all of the above, noting the principle of imperfect recollection, that the earlier mark has a medium level of distinctive character, and that consumers rarely have the opportunity to compare marks side by side, I consider that the average consumer is likely to mistake the parties' marks for one another despite the goods only being similar to a low degree. I make this finding on the basis of the interdependency principle and as I consider this lesser degree of similarity between these goods will be offset by the identity between the contested mark and the earlier mark. Consequently, I find that there is a likelihood of direct confusion between the marks in issue.

Final Remarks

53. For the avoidance of doubt, even if I am wrong in my finding that the marks are identical, they would be highly similar. Consequently, my finding would remain the same, when factoring the principle of imperfect recollection and the interdependency principle. Consequently, the opposition would have succeeded in respect of the goods for which I have found there to be similarity under section 5(2)(b) in any event.

CONCLUSION

54. For the reasons outlined above, the opposition succeeds under section 5(2)(a) in respect of all of the goods that I have found to be similar. Therefore, the contested mark is hereby, subject to any successful appeal of my decision, refused registration for the following:

Powder (Cake -); Cake powder; Cake frosting; Frosting [icing] (Cake -); Cake frosting [icing]; Cake icing; Icing for cakes; Cake batter; Cake flour; Cake dough; Cake mixtures; Cake mixes; Cake doughs; Candy cake decorations; Chocolate

decorations for cakes; Cake preparations; Powder for making cakes; Cake decorations made of candy; Edible ice powder for use in icing machines; Dough for cakes; Crystallized sugar for decorating cakes; Candy decorations for cakes; Frosting mixes; Icing; Baking powder.

55. However, the contested mark may proceed to registration (again, subject to any successful appeal of my decision) for the following goods, which I have found to be dissimilar:

Sponge cake; Chocolate cake; Almond cake; Candy cake; Sponge cakes; Cake Pops; Cream cakes; Iced sponge cakes; Treacle cake; Deep chocolate cake made with chocolate sponge; Chocolate cakes; Breakfast cake; Cakes; Cake bars; Ice-cream cakes; Cupcakes; Sponge fingers [cakes]; Ice cream cakes; Fruit cake snacks; Chocolate covered cakes; Rice cake snacks; Fruit cakes; Shortbread with a chocolate coating; Iced fruit cakes;

COSTS

56. As both parties have had a reasonable degree of success, each party is to bear their own costs.

Dated this 23rd day of December 2025

B Hartland
For the Registrar